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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 962, 963, 980.
(October Term, 1940.)

MARTIN M. GOLDMAN, JACOB P. SHULMAN and THEODORE GOLDMAN,

Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS.

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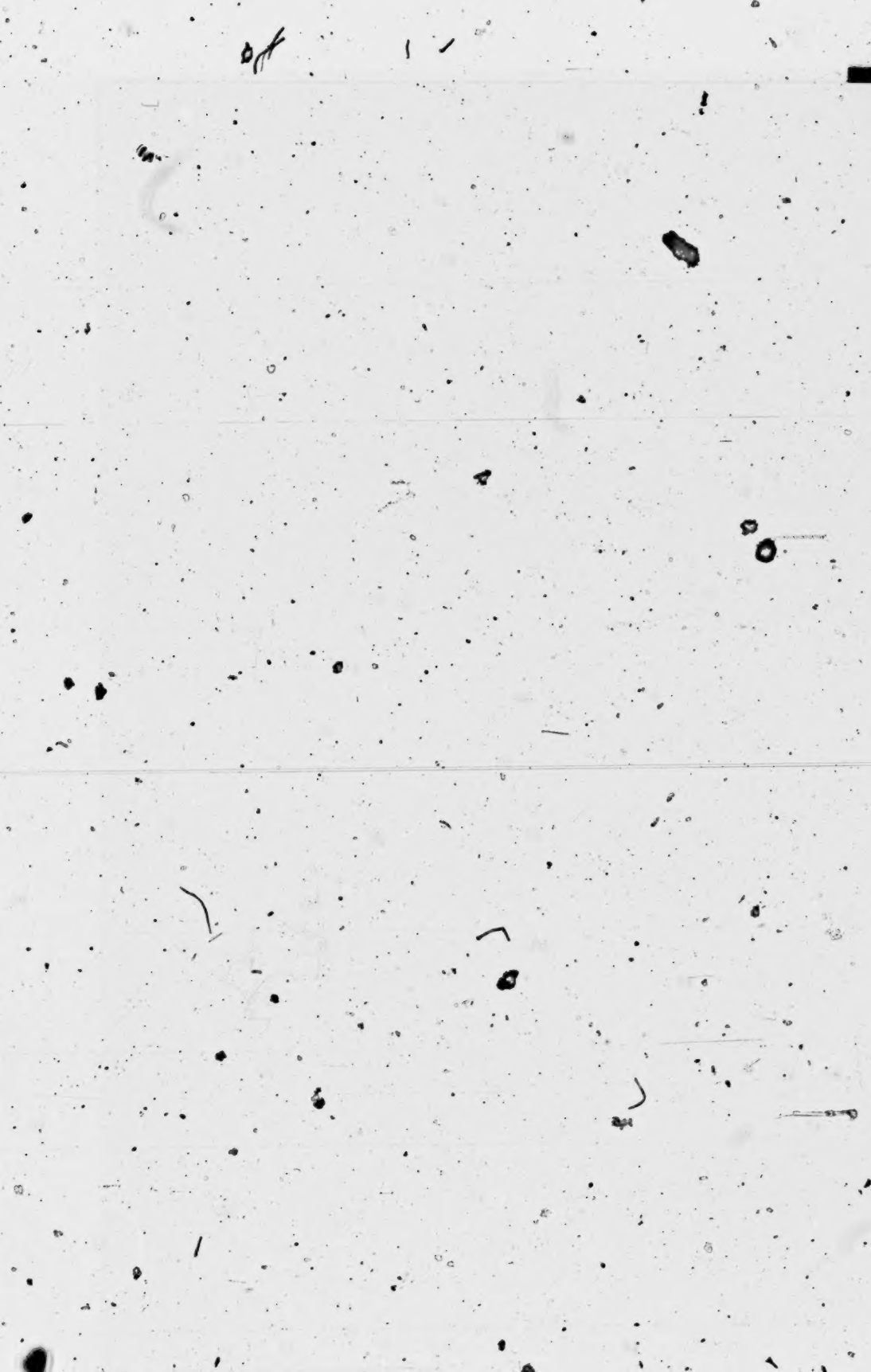

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Errors Intended to be Urged	7
Summary of Points Relied Upon	8
Argument:	
POINT I—An unconstitutional trespass made possible the overhearing of the conversations admitted in evidence	9
POINT II—The use of the detectaphone by the agents of the Federal Bureau of Investigation was a violation of the Fourth Amendment	14
POINT III—The amplification of portions of telephone conversations by the Government agents without the consent of any party thereto constituted a violation of §605 of the Federal Communications Act and the use in evidence of testimony of these conversations was improper	22
POINT IV—Counsel for defendants were entitled to inspect the memoranda used by Government witnesses to refresh their recollection prior to testifying, particularly when such memoranda related to the manner of obtaining evidence challenged as being in violation of defendants' constitutional rights	27
Conclusion	34

Citations.

Cases:

	PAGE
Agnello v. United States, 269 U. S. 20	19
Boyd v. United States, 116 U. S. 616	16n
Burdeau v. McDowell, 256 U. S. 465	20
C. W. Hall Co. v. Marquette Cement Co., 208 Fed. 260	32
Comm. v. Everson, 123 Ky. 330	20
Comm. v. Wakelin, 230 Mass. 567	20
Comm. v. Wilkins, 243 Mass. 356	20
Davenport v. McKee, 94 No. Car. 325	32
DeLore v. Smith, 67 Ore. 306	20
Entick v. Carrington, 19 How. St. Tr. 1029	15
Goode v. State, 158 Miss. 616	20
Gouled v. United States, 255 U. S. 298	16
Hamilton v. Rice, 15 Tex. 382	32
Kouba v. Horacek, 63 Hun 636	31
Lennon v. United States, 20 F. 2nd 490	32
Milligan, *Ex parte*, 4 Wall. (71 U. S.) 2	21
Mullaney v. United States, 82 F. 2nd 638	32
Nardone v. United States, 302 U. S. 379	24
Nardone v. United States, 308 U. S. 338	12, 23
Nueslein v. District of Columbia, 115 F. 2nd 690	13
Olmstead v. United States, 277 U. S. 438	17, 18
People v. Cotta, 49 Cal. 166	20
Ratner v. Sadowsky, 156 N. Y. Supp. 292	31
Schoborg v. United States, 264 Fed. 1	20
Silverthorne Lumber Company v. United States, 251 U. S. 385	12, 17
Smith v. United States, 2 F. 2nd 715	19
State v. Allen, 37 La. Ann. 685	20
State v. Collins, 15 So. Car. 373	32
State v. Deslovers, 40 R. I. 89	31

PAGE

State v. Kaasa, 198 Minn. 181 20
State v. Magers, 36 Ore. 38 32
State v. Minneapolis Mills Co., 124 Minn. 34 20
Tibbetts v. Sternberg, 6 Barb. 201 33
United States v. Feldman, 104 F. 2nd 255 19
United States v. Goldstein, 120 F. 2nd 485 12
United States v. Lee, 274 U. S. 559 19
United States v. Polakoff, 112 F. 2nd 888 24
United States v. Socony Vacuum Oil, 310 U. S. 150 30
United States v. Weiss, 34 F. Supp. 99 20
Weiss v. United States, 308 U. S. 321 24

Constitution of the United States:

Fourth Amendment 11, 12, 13, 14, 15, 16, 17, 18, 20

Statutes:

Federal Communications Act (U. S. C., Tit. 47, c. 5, Sec. 605) 22, 23, 26

Miscellaneous:

Cooley, Constitutional Limitations, 7th Ed., p. 425 .. 15n, 16
Hearings on H. R. 2266 and H. R. 3099, 77th Cong. 1st Sess., before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives 21n
McLane, Constitutional Law, p. 313 ..... 15n
Von Holz, Constitutional Law, p. 257 ..... 15n
Wigmore, Evidence 30, 32, 33

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BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 118 F. 2nd 310. No opinion was rendered in the District Court other than the oral ruling on the preliminary motion to suppress evidence which is found in the record at pages 164-167.

Jurisdiction.

The jurisdiction of this Court is invoked under §240(a) of the United States Judicial Code, 28 U. S. C. 347. The judgment of the Circuit Court of Appeals was entered on March 26, 1941, and petitions for writs of certiorari were filed on behalf of Martin M. Goldman and Jacob P. Shulman on April 18, 1941, and on behalf of Theodore Goldman on April 23, 1941.

Statement of the Case.

The indictment in the case at bar (3) charged a conspiracy between petitioners, who are all lawyers (and one Kandell, as to whom the case was dismissed during the trial), in fraudulently causing a bankruptcy petition to be filed and then withdrawn in an endeavor to obtain the sum of $400.00. The facts, as developed at the trial, are as follows:

Paul Hymowitz, an army and navy goods store retailer, was in difficulties. Robert Hoffman, an attorney, who was related to him, advised him to execute an assignment for the benefit of creditors to Hoffman's office employee, one Samuel Kolman, who retained Hoffman as attorney (176-178). At a meeting of the creditors, called at their request, and held at the Dry Goods and Furnishings Association on March 25th, 1937, Samuel Kandell, an officer of the association, presided (190). Among those present, in addition to several creditors, were Hoffman, Gabriel Wishbow (an auctioneer retained by the assignee) and petitioner Martin M. Goldman, whose firm represented a creditor (191). Kandell was named as a defendant in the indictment, but it was dismissed as to him at the close of the Government's case (531). Neither petitioner Theodore Goldman nor petitioner Jacob Shulman was present at this meeting. At the instance of some creditors Hoffman made arrangements for inspection of the stock (196).

Meanwhile some of the creditors became dissatisfied with the prospective liquidation in the assignment proceeding and on April 3d, 1937, an involuntary petition in bankruptcy was filed against the assignor by creditors represented by petitioner Shulman (199, See Exhibit 3, 980). On the same day (980) the United States District Court entered an order staying the assignee's sale. The

order was based upon a verified petition setting forth the execution of the assignment for the benefit of creditors and the facts preceding the filing of the bankruptcy petition (981-2). Hoffman moved to have the stay vacated (198-199), but the Court denied his application, suggesting that the parties get together (200).

Hoffman, enraged by this turn of the proceedings, on April 5th, 1937, (288, 203) complained to the Federal Bureau of Investigation. He declared that on March 25th, 1937, he had had a conversation with Martin M. Goldman in the presence of Wishbow, the auctioneer, wherein Martin M. Goldman proposed a plan for the sale of the assets in bulk for a price sufficient to permit the payment of a 40% dividend to the creditors, which plan contemplated that the true price should not be disclosed to the creditors but that a lesser price should be reported and the difference be divided among Kandell, Hoffman and Goldman (193). Wishbow was called as a witness by the Government and his testimony as to the alleged conversation of March 25th, 1937, was thus summarized by the trial judge (364):

> "He testified on direct examination so far as he recalled he heard no conversation out in the hall or any other place that there was to be a secret price to be paid for the goods different from the one that was actually to be paid out. I was watching his testimony closely and that was his testimony."

Then on April 7th, 1937, a conversation took place in petitioner Shulman's office, with Shulman, Martin M. Goldman and Hoffman present (205). At this time Hoffman was acting under instructions by the F. B. I., and pretended to acquiesce in the alleged proposed plan. Hoffman alone knew that agents of the F. B. I. were listening in the adjoining office by means of a detectaphone or other hear-

ing device. At this meeting, according to Hoffman himself, "Martin Goldman stated that he came into the picture to represent the creditors, and that he was going to look out for the best interests of all creditors, and then there were some other discussions about assignments and sales and the like" (205).

Three subsequent conferences—on April 14th, 21st and 26th, 1937—took place in Shulman's office. Neither of the Goldmans was present at any of these. The conversations, which were between Shulman and Hoffman, were recorded by Government agents, who were listening in the next office in the same manner.

Thereafter, on May 14th, 1937, Hoffman applied for and obtained a court order dismissing the bankruptcy petition; the papers on this motion were drawn by petitioner Theodore Goldman (221, 1007-1008). Any arrangement to conduct a bulk sale was, however, precluded by the refusal of one of the creditors to assent, with the result that the assets were ultimately sold at auction. (282). The proceeds of this sale were distributed to the creditors in the form of a dividend of between 16 and 17 per cent. instead of the 40 per cent. called for by the unconsummated bulk sale plan (282, 1009).

The principal issue litigated was whether petitioners were acting in good faith and in the interests of the creditors or were actually planning to dispose of the assets for an amount greater than would be disclosed to creditors in order secretly to divide the surplus. It may be noted that as to petitioner Theodore Goldman, the theory of the prosecution and of the Trial Court was only that he had an opportunity to acquire guilty knowledge because of his partnership with his brother Martin (513, 935) and that the circumstantial evidence entitled the jury to pass upon the question of his alleged complicity. On the issue of good faith the Circuit Court of Appeals said no more (1094) than that this was a question for the jury; it did

not separately discuss the evidence relating to any one of the petitioners.

In preparation for trial petitioner Shulman ascertained, through the superintendent of his building, that agents of the Federal Bureau of Investigation had, without his consent, entered his office late at night and installed a dictaphone device with wires running into Room 1508, adjoining Shulman's office, which was vacant. A motion was then made to suppress any evidence which might have been obtained as the result of such installation and trespass (20-40). In opposition to that motion, Harold P. Turner, one of the agents of the Federal Bureau of Investigation, denied (41) that any telephone wires had been tapped, but admitted that an apparatus had been installed to make it possible to overhear conversations, saying that use was made of an existing hole where a pipe ran to conceal a microphone in the surface of the wall separating the two rooms.

At the preliminary hearing held on this motion (44-168) it appeared that on account of noises in the pipe, the dictaphone proved useless as a means of overhearing conversations and that the agents had also installed a detectaphone, which is a microphone which amplifies sounds through a wall. This was placed on the wall between Rooms 1508 and 1509, but was wholly in Room 1508. No mention had been made of the installation of this detectaphone in the affidavit submitted by the government in opposition to the motion to suppress (41). At the preliminary hearing it appeared also that the government agents had entered Shulman's office for the purpose of determining its layout and that a description of that layout was given to the agent who placed the detectaphone and that it helped him in locating where that detectaphone should be placed. We will discuss this testimony in more detail hereafter.

At the conclusion of the preliminary hearing the presiding judge denied the motion to suppress on the ground that nothing had been overheard through the dictaphone and that the installation of the detectaphone constituted no violation of the rights of the defendants (164-168). At the trial the testimony with regard to what occurred during four conversations in Shulman's office was given by several agents of the Federal Bureau of Investigation (372-453; 466-494), despite objection on the ground that the receipt of such testimony constituted a violation of petitioners' constitutional rights (381, 382).

It appeared also that the government agents had overheard Shulman's end of several telephone calls. The Judge overruled objections to the use of such information by the agents, holding that their overhearing of those telephone conversations was not within the prohibitions of the Communications Act (168). This ruling was also adhered to at the trial by permitting the introduction in evidence of the telephone conversations so overheard (409, 410; 413; 414; 420, 421; 433; 445-449; 450).

While originally the motion to suppress was made only by petitioner Shulman (21), the other petitioners joined in the motion at the preliminary hearing (84, 499), participated in the cross-examination of witnesses (74, 91, 107, 123, 155) and were allowed the benefit of exceptions to the denial of the motion (168) and also to the overruling of their objections to the receipt in evidence of the agents' testimony (382).

The agents of the government admitted, at the preliminary hearing, that they had refreshed their recollections by consulting certain memoranda which they had made at the time of the occurrences. These memoranda covered various matters, such as the entry into Shulman's office and the installation of the two devices and the manner of listening over them. The agents did not, however, actually refer to the memoranda while on the

witness stand. For that reason, the Trial Court, although it had first intimated that it would rule otherwise, refused the demand made by counsel for defendants that these memoranda be produced and submitted for inspection.

The Circuit Court of Appeals upheld the Trial Court in all respects. It concluded that the use of the detectaphone was "only an instance of eavesdropping" and that nothing had been obtained as the result of the secret entry into Shulman's office (1095). It held that the memoranda could not be inspected except when a witness actually used them when testifying (1096).

The Circuit Court also held that there had been no interception of a communication so as to make applicable the provisions of the Communications Act (1095).

Errors Intended to be Urged.

Separate assignments of error were filed on behalf of Shulman (1060-1078) and on behalf of Martin and Theodore Goldman (1052-1065) which, however, are substantially to the same effect. Of these reliance is placed upon No. 5 (1053-54, 1066-67), which deals with the denial of the motion to suppress evidence, Nos. 6, 7 and 8 (1054, 1068), which deal with the request to inspect certain memoranda, and Nos. 11 and 12 (1061, 1075) which deal with the introduction in evidence of the testimony of the government agents.

SUMMARY OF POINTS RELIED UPON.

POINT I.

An unconstitutional trespass made possible the overhearing of the conversations admitted in evidence.

POINT II.

The use of the detectaphone by the agents of the Federal Bureau of Investigation was a violation of the Fourth Amendment.

POINT III.

The amplification of portions of telephone conversations by the Government agents without the consent of any party thereto constituted a violation of §605 of the Federal Communications Act and the use in evidence of testimony of these conversations was improper.

POINT IV.

Counsel for defendants were entitled to inspect the memoranda used by Government witnesses to refresh their recollection prior to testifying, particularly when such memoranda related to the manner of obtaining evidence challenged as being in violation of defendants' constitutional rights.

ARGUMENT.

POINT I.

An unconstitutional trespass made possible the overhearing of the conversations admitted in evidence.

In opposition to the motion to suppress the Government submitted only agent Turner's affidavit (41). This described the microphone in the hole in the wall which was installed at the time of the illegal entry into Shulman's office, but made no mention whatsoever of any detectaphone. Subsequently, on the preliminary hearing, it developed for the first time (80, 81) that the Government's agents were relying exclusively upon a detectaphone as the alleged instrumentality for overhearing. Apart from the disingenuous character of this attitude, the surprising change in position has an important bearing upon Point IV, (*infra* page 27) relating to the inspection of the agents' memoranda.

As already noted, the Trial Court ruled that no use was made by the Government of the microphone installed as the result of the trespass (165). And this view was accepted by the Circuit Court of Appeals (1095). The Trial Court's ruling was assigned as error in the Circuit Court of Appeals (1053, 1066) and the decision of the Circuit Court of Appeals was complained of in the petition for certiorari originally filed herein (petition pp. 11, 13).

It is conceded that two agents of the Federal Bureau of Investigation obtained entrance to Shulman's office, Room 1509, on the night of April 6, 1937 for the purpose of installing a microphone and that this was done without his knowledge or consent (120, 463). They studied the layout of the office (103) and installed a microphone in a small opening in a wall which ran from that office to the adjoining vacant office of which they had taken pos-

session, Room 1508 (86, 87). The microphone was connected by wire to an amplifier located in the latter room. Both these agents, Ransom and Turner, testified at the preliminary hearing. Both agreed that one of their purposes in entering Shulman's office was to study the layout of that office. As Ransom said (91):

> "Q. So that when you went from 1508 around into 1509 one purpose was to see where the desk was and where the chairs were and where the instrument* could be most advantageously located? A. Well, I think it had been described to me as to what was there.
>
> "Q. I see, that was your purpose? A. That was one purpose, yes, that is right.
>
> "Q. That was one purpose, that is what I mean, it was a necessary purpose, wasn't it? A. Yes."

Turner was asked about the entry into Shulman's office as follows (120, 121):

> "Q. And you got a pretty good idea of Shulman's office layout? A. I had at that time, yes, sir.
>
> "Q. And you still had the next day? A. Yes, sir."

Ransom was not present on the next day when the microphone was discarded (87), but Turner was. However, Turner did not install the detectaphone. That was installed by another agent, Harold O. Schroeder (100). Schroeder testified that Turner had described the arrangements of Shulman's office to him and that this helped him in selecting a location for the detectaphone (103):

> "Q. Mr. Turner had a pretty good layout in his mind's eye on the Shulman office layout, didn't he? A. Yes, sir.
>
> "Q. Didn't that help you somewhat in picking out a good spot to listen to the conversation? A. It did."

---

* The instrument to which reference was made in this questioning was the microphone later discarded, not the detectaphone later used.

Schroeder was very reluctant to admit that Turner had told him where to put the detectaphone (112-115) and, on re-direct examination by the government, sought to convey the impression that he located its position solely by experiment (116). However, he did not retract the testimony originally given on cross-examination that Turner's description of the layout of Shulman's office helped him in picking out a good spot to listen to the conversation. And no amount of testimony that the location of the detectaphone was determined by experiment can take away from the force of the first testimony. For the knowledge of the layout of Shulman's office was bound to be of help in determining the area within which the trial uses would be made, in saving time in the trial and error placement of the detectaphone. Without that so much time might have been lost in the process of trial and error that the result might have been negligible.

Turner, moreover, admitted on cross-examination that the two installations were not isolated, but that he considered them as part of one job (134).

It should also be noted that Shulman's office was divided into two parts, an outer office and an inner office (see diagram, 952). The all which divided the office from Room 1508, the vacant room occupied by the agents, and on which the detectaphone was placed, ran the length of both of these divisions of Shulman's suite. Thus the trespass into Shulman's suite apprised the agents as to which half of the wall of Room 1508 should be used in order to overhear what might be said in Shulman's private office.

Certainly, in view of all the facts and Schroeder's express admission that he was helped by the knowledge of the layout of Shulman's office obtained by Turner, it cannot be said that the trespass did not help in obtaining the ultimate evidence.

This Court has laid down the salutary rule that when there has been an entry into premises in violation of the

Fourth Amendment, any evidence obtained as the result of such violation must be banned. This principle was first clearly stated in *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, where the Court said:

> "The knowledge gained by the Government's own wrong cannot be used in the way proposed."

And in *Nardone* v. *United States*, 308 U. S. 338, this Court reiterated that rule. There, the illegality consisted not in an unlawful search as in the *Silverthorne* case, but in illegal wiretapping. Nevertheless, using the *Silverthorne* case as authority, this Court held that indirect use of evidence improperly obtained was improper since otherwise the very methods deemed "inconsistent with ethical standards and destructive of personal liberties" would be invited. Since in that case no opportunity had been allowed for investigation into the illegal sources of the material offered, the conviction was reversed in order to give the accused an opportunity to prove "that a substantial portion of the case against him was a fruit of the poisonous tree." The inference is, of course, plain, that the fruit of such tree may not be used.

The basic principle involved in those cases was recognized also in the Circuit Court of Appeals for the Second Circuit in *United States* v. *Goldstein*, 120 F. 2nd 485, now before this Court. There the question arose in considering whether or not witnesses might be allowed to testify who had been induced to become informers because of wiretapping conducted by the government. The Court recognized that testimony by witnesses so situated would be "fruit of the poisonous tree", but ruled adversely to the contention of the defendants in that case on the ground that they were not in a position to complain of the wiretapping because their own wires had not been tapped.

The same principle was applied to a somewhat different set of facts in *Nueslein* v. *District of Columbia*, 115 F. 2nd 690. There Judge Vinson fully reviewed the decisions of this Court and other Federal Courts and held inadmissible a statement made by a defendant at the time officers illegally searched his premises. His conclusion was that in no other way could the guaranty of the Fourth Amendment be made effective than "to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home."

In the case at bar the Court at the preliminary hearing concluded that the unlawful entry did not aid the agents in attaching the detectaphone, saying:

> "They could just as easily and just as well by the method that they did adopt, of trying out various places on the wall in Room 1508, determine and locate the space upon which this device should be attached there, as if they had never been in 1509" (165).

This ruling was apparently the basis of the statement by the Circuit Court of Appeals:

> "Nothing was obtained as the result of any secret entry of Shulman's office. No trespass upon his premises in any way helped to obtain the evidence" (1095).

It is submitted that in view of all the testimony there is no basis for the conclusions reached either by the trial judge or the Circuit Court of Appeals and that in actual fact the unconstitutional trespass did facilitate the installation and use of the detectaphone, and did, therefore, materially contribute to the hearing of the conversations testified to by the government agents. These conversations were "fruit of the poisonous tree" and should have been excluded, entirely aside from the question whether or not the use of the detectaphone in and of itself violated the Fourth Amendment.

POINT II.

The use of the detectaphone by the agents of the Federal Bureau of Investigation was a violation of the Fourth Amendment.

The circumstances with regard to the installation of the detectaphone have already been outlined. Three agents of the Government listened in, Bodinger, Turner and Rubenstein. Of these Bodinger was a stenographer (372). He testified that he had taken down everything which he had overheard (373), although there were many instances when he was unable to hear what was said because the voices were too low or too loud (378). Objection was taken by counsel for Shulman to the use of the transcripts on the ground that the evidence had been obtained in violation of his constitutional rights (381). Mr. Corbin, the attorney for the Goldmans (169), made a similar objection on behalf of his clients (382). Exceptions were duly noted.

Bodinger then read the transcripts (382-451). These show that in more than three hundred instances the listener missed what was said. At times nearly half of what was noted down "was something missed." Four separate conversations were overheard. The first of these was the one which took place on the afternoon of April 7, 1937 (374, 383). Much of the transcript is meaningless. It starts out with a conversation between Hoffman and Shulman. At some later point Martin Goldman entered (see 389) and there was excited argument during the course of which Goldman accused Hoffman of having made some false statement about him to the judge (390). Subsequently Goldman left (see 406) and then Hoffman left (409). The listeners overheard a telephone conversation which Shulman had with some unidentified person in which Goldman was referred to as "smart" (409).

The second conversation took place on April 14, 1937, again in Shulman's office between Hoffman and Shulman. But this time Goldman was not present (412). This conversation consisted mostly of a discussion of how much the different parties were to receive (412-421). The third conversation was also between Hoffman and Shulman and took place on April 21st (421-442). It included numerous references to Goldman and what he was to receive (431, 432, 440, 441). The last conversation took place on April 26th again between Hoffman and Shulman (442-451). Martin Goldman was referred to specifically as receiving "an equal share" with Shulman and Hoffman (448, see also 451).

These transcripts, substantially corroborated by the other agents, Turner (466, 467) and Rubenstein (479), were the chief reliance of the government in corroboration of Hoffman. They were, therefore, essential to the case against petitioners.

It is submitted that the use of such evidence under the circumstances of this case was a violation of the Fourth Amendment since the evidence was obtained in violation of the right of privacy guaranteed by that amendment.

This Court has, with rare exceptions, given to the Fourth Amendment a broad and liberal construction so as to preserve the basic purpose for which it was placed in the Constitution. That the Fourth Amendment was created to embody an ancient principle of English liberty that "every man's home is his castle" has been recognized by various writers on constitutional law.* It was enacted against a historical background of the use of general warrants in proceedings for seditious libel, which resulted in the judgment of *Entick* v. *Carrington*, 19 How. St. Tr. 1029. There Lord Camden declared the objection-

* Cooley, Constitutional Limitations, 7th Ed. p. 425;
McLane, Constitutional Law, p. 313;
Von Holtz, Constitutional Law, p. 257.

able practices illegal, ruling, among other things (p. 1073) that a search for evidence as such was illegal. And this Court in *Gouled* v. *United States*, 255 U. S. 298, carried over into American constitutional law this decision of Lord Camden, by ruling that not even a search warrant could be obtained for the purpose of securing to the Government material which was evidentiary in character only.

While the emphasis of many of the decisions is upon the search for and seizure of tangible objects, it must not be forgotten that the Fourth Amendment condemns not merely a seizure, but a search as well, and search there may be for purposes other than the seizure of tangible objects.

It will be readily conceded that the Amendment was designed to protect the citizen against the "prying eyes" of the government. (Cooley, op. cit. 425). Can it be said that the government may use its ears without let or hindrance?

The Trial Court in this very case expressed the opinion that had the conversations been overhead as the result of the microphone originally placed in the office of Shulman, the testimony would have been inadmissible as in violation of constitutional right (165). Nevertheless, there would have been no search or seizure in the conventional sense.* In the mind of the Trial Court the distinction appears to have been between a mechanical device which was placed inside of the office, and one merely applied to its exterior walls. We submit that no such narrow distinction can constitutionally be made. Surely, the outside wall is as much a part of the office or home as is the inside wall. If this had not been an office among many offices in a large building, but a shack isolated in the woods, could it be said that the installation of a scientific instrument on the *outside* wall of such a shack would not be a violation of the constitutional guaranty, whereas

* As there was not, of course, in the *Boyd* case, 116 U. S. 616.

there would be such violation had the mechanism been placed within the four walls? In both cases the government has actually trespassed upon the premises by an invasion thereof not consented to by the owner or occupant.

What the government has done here is to "tap" the walls of an office—that it should be an office rather than a home is, of course, inconsequential (see *Silverthorne* v. *United States*, *supra*). But for the decision in the *Olmstead* case, 277 U. S. 438, it could hardly be doubted that any tapping, whether of walls or of wires, would be an invasion of the constitutional guaranty. Nevertheless, within the precise reasoning and meaning of that decision, it is submitted that these petitioners have been materially aggrieved and are entitled to a reversal. The language there employed by the Court establishes that the tapping of the walls of a home or office is distinguishable in principle from the tapping of telephone wires. For, as Chief Justice Taft declared for the Court in the *Olmstead* case:

> "The reasonable view is that one who installs in his house a telephone instrument with connecting wires, intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment" (p. 466).

The Court thus took the position that where a person used a telephone wire, he ran the risk that some one might overhear the conversation on that wire since his intention was to project his voice beyond the protection of his private premises.

Not so is the case of persons conferring in a lawyer's office (apart from any question of privilege). They have no intention of projecting their voices. True, if they speak too loudly they know they may be overheard; so,

if they leave doors or windows open, they run a like risk. Where, however, as here, all ordinary precautions are taken to preserve inviolate the confidential character of the discussion occurring within the office, it would be a destruction of all right of privacy to permit what was so confidentially discussed to be used by government agents who were enabled to overhear the discussion through the use of extraordinary mechanical means,* particularly where those means were directly applied to the walls of the premises themselves.

The Circuit Court of Appeals characterized this as merely eavesdropping (1095). That is not an adequate description of what happened. Eavesdropping connotes a situation where the person whose conversations are overheard has been careless. It is not constitutionally prohibited, because presumably the Constitution helps only those who help themselves. So if a person does something before a window through which he can be observed, he has not exercised the requisite self-help and the observer, whether he use his unaided eyes or a field glass, is entitled to give testimony concerning what was observed. So if a person speaks concerning private matters in a tone of voice loud enough to carry through doors or walls, he cannot object if a person, who is stationed outside of the premises, testifies to what he overheard. On the other hand, if reasonable and ordinary precautions to preserve privacy are observed, the Government should not be able to put in evidence information obtained by the use of some extraordinary scientific device, whether it be, as Judge Brandeis intimated in the *Olmstead* case, *supra*, at 474, apparatus which would photograph the contents of papers in a person's desk without ac-

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* F. B. I. Agent Ransom testified that the detectaphone could be employed to overhear conversations through a stone wall, saying (95):

"Q. Can you take that through a stone wall?
A. It is possible, yes."

tually removing the papers, or the device used here which abstracted sounds through the walls. That in neither case there was a technical seizure should make no difference. In both instances there was, in effect, a search. And surely the spirit of the Fourth Amendment was violated.

The cases relied upon in the Circuit Court of Appeals (1095) have no application to the case at bar. In *Smith* v. *United States*, 2 F. 2nd 715, it was claimed that the discovery of liquor in an open car was in violation of the Constitution because the Government agents used a flashlight to see the liquor. This argument was rejected, the Court stating:

> "A search implies some exploratory investigation. It is not a search to observe that which is open and patent, in either sunlight or artificial light."

These observations might apply to the case at bar had conversations been overheard by the ordinary methods of eavesdropping. They have no relation to the particular methods here used.

And in the other case cited, the *Feldman* case, 104 F. 2nd 255, the facts are still less similar. There the agents, after having seen one defendant load a car with suspicious material, followed him to his home, where they smelled the odor of cooking mash. The Court held that they had the right to enter the home, arrest the occupants and seize the material since a felony was being committed in their presence. And the search was but a lawful incident of the arrest.

The various cases cited by the Government in its brief filed in opposition to the applications for writs of certiorari are of no assistance. Surely the two cases from this Court, the *Agnello* case (269 U. S. 20) and the *Lee* case (274 U. S. 559) are in no way pertinent here. In both of these cases the Government agents merely observed by the use of their eyes, unaided, actions which the defendants took no pains to conceal.

In none of the other cases cited (Brief, pp. 8, 9) was any constitutional point raised. In the *Schoborg* case, 264 Fed. 1, there was passing reference to the fact that evidence was overheard as the result of the installation of a dictograph. However, since this was installed by private persons there could have been no objection, even if papers had been seized (*Burdeau* v. *McDowell*, 256 U. S. 465); besides no contention was raised by defendants that their constitutional rights had been invaded. In the *Weiss* case, 34 F. Supp. 99, it does not appear how the "room conversations" were overheard, but in any event no point was raised by defendants with regard to these, their objection relating solely to wiretapping evidence.

Nor was any constitutional issue raised in any of the State cases. In several of these, as in the *Cotta*, *Allen*, *Goode* and *Everson* cases, there was conventional eavesdropping. The *DeLore* case involved eavesdropping over the telephone on a party line, but it was eavesdropping by a private individual and the testimony was offered in a civil action—it is inconceivable, therefore, what bearing that case has on the problem here presented. In two of the cases to be sure, those from Massachusetts and Minnesota, conversations were overhead as the result of dictographs installed in prison cells. While there was no constitutional question discussed in either of these cases, it should be noted that both these jurisdictions reject the rule established by this Court requiring the disregard of evidence obtained in violation of constitutional right. (See *Commonwealth* v. *Wilkins*, 243 Mass. 356; *State* v. *Kaasa*, 198 Minn. 181). Moreover, it is doubtful whether a prison cell is a man's "home" within the Constitutional guaranty.

We believe, therefore, that none of the authorities relied upon by the Circuit Court of Appeals govern the disposition of this case and that the spirit of the decisions heretofore rendered by this Court under the Fourth Amendment calls for a ruling that the conversations tes-

tified to by the government agents were inadmissible because overheard in violation of the Fourth Amendment.

May we call this Court's attention to the fact that only recently the Congress of the United States evidenced its great concern for the right of privacy by refusing to amend the Communications Act, though at the request of the Department of Justice, to authorize the use of wire-tapping by government agents in certain classes of cases. In opposition to the proposed legislation representatives of all of the labor organizations, including the railroad brotherhoods, and representatives of every shade of liberal opinion, appeared.* We believe that this attitude on the part of Congress is but a further illustration of the great importance attached to the right of privacy.

Nor do we believe that the fundamental rights guaranteed by the Constitution can be relaxed because of the existence of any emergency, not even the existence of the war just forced upon us. The lapse of 75 years has not dulled this Court's ringing words in *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, at 120:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

We submit that if the decision now under review is permitted to stand, its effect upon the privacy of the people wil be disastrous. Such a decision would be an invitation to government agents to invade the home and, by the use

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*See hearings before sub-committee No. 1 on the Committee of the Judiciary, House of Representatives, 77th Congress, First Session, on H. R. 2266 and H. R. 3099 (1941).

of a similar device, overhear conversations between husband and wife. They would invade the privacy of the great professions of law and medicine and overhear conversations between physician and patient, and attorney and client. Indeed, they would also be able to invade the age-old sanctity of the confessional and overhear conversations between priest and penitent. We submit that no such things should be permitted to come to pass.

POINT III.

The amplification of portions of telephone conversations by the Government agents without the consent of any party thereto constituted a violation of §605 of the Federal Communications Act and the use in evidence of testimony of these conversations was improper.

This error was duly reserved by timely objection and exception at the preliminary hearing (168), by specification in the assignments of errors filed by all petitioners (Nos. 11, 1061, 1075), and inclusion in both the original petition for certiorari (pp. 17-18) and the petition for rehearing (p. 5).

The facts bearing on the point may be briefly stated and are uncontroverted. In the course of listening via the detectaphone to what was happening in petitioner Shulman's office, the Government agents heard and recorded the contents of one end of each of at least seven telephone conversations. In each instance they were able to hear what petitioner Shulman was saying on his telephone, but they apparently did not hear what the other party was saying. When it appeared that the government would offer testimony of the contents of these conversations, counsel seasonably protested (168) "that there was an interception of telephone messages which in my opinion are just as much a violation of the Federal Communi-

cations Act of 1932 and 1933 as it would be as if those wires were tapped." The objection was overruled, the trial Court declaring "that that is not the type of telephone wires within the meaning of the Communications Act." An exception applicable to all defendants was noted (168).

Under this ruling the prosecution was permitted to read into evidence the contents, so far as the microphone had rendered them audible, of the seven telephone conversations mentioned. They appear in the transcript of record at the following respective points: fols. 1225-1229; 1238-1239; 1239-1240; 1260-1261; 1299; 1333-1345; and 1347-1348.

Clearly two of the conversations, the first and the sixth, bear directly upon the subject-matter of the charge. They include talk that will bear an incriminating construction. This is so obvious that the Circuit Court of Appeals (1093) quoted at length from the first conversation to sustain its holding that the evidence established the existence of the alleged conspiracy. However, the Circuit Court held (1095): "No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934 (c. 652, 48 Stat. 1064, 1103; 47 U. S. C., A. Sec. 605) as construed in *Nardone* v. *United States*, 308 U. S. 338."

We contend that this ruling was reversible error. The pertinent portion of the statute reads simply:

> "* * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of an-

other not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *"

The first and third of the three clauses quoted are applicable to both interstate and intrastate communications (*Nardone* v. *United States*, 302 U. S. 379; *Weiss* v. *United States*, 308 U. S. 321). In substance the law forbids a person not authorized by the sender to intercept any communication and divulge its existence or contents. Moreover—and this is especially significant in the instant case—the statute explicitly bars the disclosure where a person not authorized has become acquainted with "any part" of the contents of an intercepted communication. It has been further held that even the consent of one of the parties to a telephone conversation is not sufficient warrant for its reception in evidence; and that an interception by means of an existing telephone extension is nevertheless a forbidden interception (*United States* v. *Polakoff*, 112 F. 2d 888, cert. den. 311 U. S. 653).

The Government's argument in answer to this point was to this effect: that petitioner Shulman's words were overheard rather than intercepted; that "it is of the essence of a telephone interception that the interceptor is placed in a position to hear both parties to the conversation;" and that "the user of a telephone entrusts his message to the circumambient air which, indifferently, conveys his words to telephone pick-up, friendly bystanders, casual eavesdroppers, or officers of the law bent on securing evidence" (brief in opposition to petition for certiorari, pp. 12-13).

It is submitted that none of the answering arguments vitiate the point. In the first place, the distinction between overhearing and intercepting is not a valid one. The statute makes no mention whatsoever of wire-tapping, physical contact with telephone instruments or the means employed to ascertain the existence or contents of a communication. The end to be accomplished is safeguarding the privacy of the indicated classes of communications. That end is just as effectively frustrated by the use of a detectaphone in the next room—enabling the listener to hear what is being said on the telephone—as by the most arrant form of wire-tapping.

Nor could the statute by its very character be limited to wire-tapping as such, for it embraces telegraph and radio communications as well as those by telephone. One may just as unlawfully become apprised of the contents of a communication by looking over a messenger boy's shoulder as he walks with a telegram in his hand, as by tapping a wire. As for radio messages, the listener who surreptitiously overhears the words by concealing himself in the room where they are being spoken into a microphone, is no less an unlawful interceptor than he who plucks them from the air with his short-wave receiving set. To argue that a telephone communication does not become invested with its character as such until it is actually being borne by the wires, is to introduce a limitation that the statute does not command. In addition, this tenuous qualification would seriously curtail the law's effectiveness and point a way to facile violation. The construction urged by the Government would appear to contravene the legislative intent—which expressly goes so far as to forbid the divulgence of the very existence of a communication.

The only practical construction that can serve the statute's purpose is simply this: once a speaker has uttered words with the intent that they constitute the transmission of a telephonic conversation, the protective force

of the statute becomes operative, and no unauthorized person should be permitted thereafter to divulge what he had managed to overhear as part of the conversation in question. The analogy of radio impulses to the human voice is a cogent one, for both the impulses and the sounds of the voice are capable of being detected while in the air and amplified by suitable apparatus to facilitate listening.

There is no merit in the contention that the interceptor —to come within the statutory ban—must be able to hear both parties to the conversation. The statute itself furnishes three reasons for rejecting such a construction. (1) It uses the word "communication," and does not mention "conversation." What one party says to another—regardless of the response—is patently a communication. (2) The statute expressly applies to parties becoming acquainted with "any part" of an intercepted communication. (3) The prohibition against divulgence applies indiscriminately to telegraph and radio, as well as telephone; therefore, the proposed requirement that the words of both parties be intercepted is altogether alien to the scheme of the statute.

The suggestion that the user of a telephone entrusts his message to the air and is therefore deemed to acquiesce in its next-door interception via detectaphone is, we submit, a rather extreme distortion of intent. On the contrary, the one telephoning may reasonably be considered as doing so in full reliance upon the law which confers an inviolable privacy upon his communication. If any person, knowing the identity of a friend to whom petitioner Shulman had frequent occasion to telephone, used a detectaphone in like fashion to pick up the other end of the conversation, the two listeners could jointly have reconstructed the entire conversation, and all without the authorization or consent—or, indeed, the knowledge—of either Shulman or his friend. This result would be achieved without physical contact with any telephone

apparatus or wire. In short, the illicit listeners would have attained the same results as though they had engaged in wire-tapping. The statute recognizes an evil and affords a remedy. It makes no mention at all of methods, and legal principle does not require that any such groundless distinction be engrafted on the law.

POINT IV.

Counsel for defendants were entitled to inspect the memoranda used by Government witnesses to refresh their recollection prior to testifying, particularly when such memoranda related to the manner of obtaining evidence challenged as being in violation of defendants' constitutional rights.

At the preliminary hearing it appeared that the agents had refreshed their recollections by reference to notes which they had taken at the time of the transactions. The right to inspect these notes was denied to defendants' counsel. This denial was sustained in the Circuit Court on the narrow ground that the memoranda had not been used by the witnesses while they were on the stand. We submit that no such narrow ground justifies the rulings in this case.

As has already been discussed, one of the important questions in the case is the extent to which the unlawful trespass into Shulman's office contributed to the hearing of the conversations which formed the basis of the testimony at the trial. It has already been pointed out that Schroeder testified that he installed the detectaphone, and that he was aided in doing so by Turner's description of the layout (103).

Schroeder, on cross-examination, referred to certain pencilled notes which he said he dictated immediately

after coming back on the first afternoon (106, 107). He stated that he had refreshed his recollection by looking at these notes (106) and that they covered the matters which he had testified about that day (108). Counsel asked the right to examine them (108). The Court refused to permit this to be done, stating that it had examined the notes and that they were not relevant at that time and contained matter which it would be improper to let the defense see (108).

Turner also testified that he had made certain notes at the time (123). At first the Trial Court said that it would allow these to be inspected, with the exception of one or two sentences, which, perhaps, should be excluded (127), but later the Court changed its mind on the ground that the reference to the memoranda was injected by counsel for the defendants and the witness had not used the memoranda (128). Turner was then recalled and admitted that he had refreshed his recollection before testifying by looking at these notes, saying (132):

> "Q. Otherwise you couldn't recall, could you, and that applies to this case, doesn't it? A. Yes, sir."

And later he testified that he could not fix certain times without reference to the memorandum he had dictated (145). Counsel then renewed the demand for the right to inspect and this was denied and exception noted (151). A similar ruling was made with regard to memoranda prepared by the agent Rubenstein (156).

It is evident that the testimony which these witnesses gave was not only based in part on the memoranda not produced, but could not have been given had the witnesses not refreshed their recollections by examining these memoranda before coming to the witness stand. Under these circumstances it is submitted that cross-examining counsel has the right to look at the memoranda and that the mere circumstance that they were not used

by the witness while on the stand should not be controlling.

There are two reasons why a memoranda relied on by a witness should be examined by opposing counsel. One is to show that in fact there were no contemporaneous notes and that the witness had been improperly given something to enable him to testify. Another is to permit counsel to show to the jury that the witness has omitted portions of the contemporaneous memorandum which might be favorable to the side represented by such counsel. Both reasons may be as pertinent when the memoranda were examined before testifying as when the witness uses them on the stand.

It seems to us that whether or not the witness actually had the memoranda while on the witness stand should not be the criterion. A witness with a good capacity to memorize might so well absorb notes given to him by the attorney for one side that he need not refer to them while on the stand. Yet his claim that he had his recollection refreshed by reading an alleged contemporaneous memorandum before going on the witness stand would be false and should be exposed. Only the production of the paper would show that it was not a contemporaneous memorandum and thus bring about the impeachment of the witness's testimony. So where a witness has testified that he used the contemporaneous memorandum for the purpose of refreshing his recollection, and there is no question about the genuineness of that memorandum, still the interest of truth would be advanced by requiring the production of the memorandum so as to make sure that the zealous witness has not colored the facts for the purpose of the particular trial.

To make the right to inspect the memoranda depend upon whether or not the witness used them at the trial puts a premium on witnesses who are able to memorize details. The search for truth should not be determined by such considerations. No good reason can be advanced

why a witness who admits having refreshed his recollection by reference to memoranda should not be required to submit those memoranda to the cross-examining attorney. Counsel should have the right to check the statements of the witness, to determine whether they really are what the witness claims them to be.

This Court has not had occasion to pass upon the precise question. The discussion in *United States* v. *Socony Vacuum Oil*, 310 U. S. 150 at 233, throws no light upon the problem here presented because the Court merely indicated that there was no iron clad rule where the Trial Court had adopted appropriate procedure to prevent the improper use of material relied upon by a witness for refreshing his recollection. It was because of the close control by the Trial Court of the Grand Jury testimony that this Court held that there had been no abuse of discretion in that case. Obviously in that case no question existed with regard to the genuineness of the memorandum, nor had it been used by the witness for the purpose of refreshing his recollection before the trial. Thus there was in that case no situation such as in the case at bar, where an examination of the memoranda relied upon might have cast discredit upon the story given by the witness.

Professor Wigmore has expressly stated that he believes that the rule here contended for by petitioners should apply, all of the reasons for the rule with regard to memoranda used by the witness while on the stand applying as well where the memoranda were used by the witness beforehand. This has been his view throughout the various editions of his work. In his Third Edition (Volume 2, p. 111) he said:

> "The rule should apply, moreover, to a memorandum consulted for refreshment before trial and not brought by the witness into court; for, though there is no objection to a memory being thus stimulated,

yet the risk of imposition and the need of safeguard is just as great. It is simple and feasible enough for the Court to require that the paper be sent for and exhibited before the end of the trial."

In *State* v. *Deslovers*, 40 R. I. 89, the Court reached the same conclusion, saying:

"The mere fact that the witness did not have the record immediately before him when he gave his testimony upon the stand does not seem to us to be material in view of the further fact that he had a very short time previously refreshed his recollection by its examination; such examination being made in contemplation of the evidence which he was about to give. Under such conditions he must be said to have obtained substantially the same assistance from the record which he would have obtained from its perusal during his examination.

"In the present case the defendant should have been permitted to show to the jury, if he could, that the statements of the witness were inconsistent with the earlier memorandum or record from which he claimed to have refreshed his memory. This he could not do unless he could see the record itself."

See also *Kouba* v. *Horacek*, 63 Hun 636, opinion reported in full in 6 N. Y. Supp. 250, and *Ratner* v. *Sadowsky*, 156 N. Y. Supp. 292.*

The Circuit Court of Appeals reached the contrary conclusion on the theory that the witness would not be

* An examination of the record on appeal in the files of the Appellate Term of the Supreme Court for the First Department in New York City shows that the memorandum in question had been used by the witness for the purpose of refreshing his recollection prior to his taking the witness stand, and had not been used by him while on the witness stand, although it was in court. The Trial Court ruled that the memorandum could be used by cross-examining counsel only if he consented that it go in the evidence; the Appellate Court reversed, holding that the memorandum could be used without conditions.

imposed upon or receive any improper communications when the paper was not handed to him on the stand, forgetting that a witness with a good capacity to memorize could receive the improper communication in advance. Indeed, the very dramatic illustration given by Professor Wigmore in explanation of the general rule (Vol. 3, p. 110) would be just as pertinent had the witness in that case been able to memorize the material which was so devastating in its effect when submitted to the scrutiny of cross-examining counsel.

Three cases were cited by the Circuit Court of Appeals. One of these, *C. W. Hall Company* v. *Marquette Cement Manufacturing Company*, 208 Fed. 260, does not deal with the subject here involved. In that case the witness was testifying with regard to value and admitted, as all witnesses testifying on value necessarily must do, that he had previously consulted various records before reaching an opinion on the subject. The error assigned was not the refusal to produce the documents but the refusal to strike the testimony of the witness. The Circuit Court of Appeals in upholding the action of the lower Court did not at all discuss the general proposition here involved. Likewise in *Mullaney* v. *United States*, 82 F. 2nd 638, there was no discussion of the principles involved. It is true that in the *Lennon* case, 20 F. 2nd 490, there was some, though meagre, discussion of the legal principles. The Circuit Court rested its conclusion largely upon certain State cases which it claimed supported its view. It is submitted that in that respect the Circuit Court of Appeals was in error.

An examination of each of those cases shows that the problem here presented was not considered. Thus in *Wabash, etc. Canal* v. *Bledsoe*, 5 Ind. 133, *Davenport* v. *McKee*, 94 No. Car. 325, *State* v. *Collins*, 15 So. Car. 373, *Hamilton* v. *Rice*, 15 Tex. 382 and *State* v. *Magers*, 36 Ore. 38, the question was not whether cross-examining counsel had the right to have the memorandum produced for his

inspection, but whether the testimony of the witness could be received in the absence of the memorandum. In the last of these cases the Court made this distinction plain, indicating that had request for the production of the memorandum been made, it might have been complied with and made use of in cross-examination. In *Tibbetts v. Sternberg*, 66 Barb. (N. Y.) 201, the question in the case at bar did not arise. The Court merely held that a paper used by a witness for the purpose of refreshing his recollection must be produced. There is, to be sure, a dictum to the effect that it must appear that the witness is using a paper as an aid to his testimony before he can be required to produce it. But that remark was not directed towards papers used by the witness before taking the witness stand, but with regard to papers which the witness might have in his possession while on the witness stand and which yet were not used by him in connection with his testimony.

It is submitted that the view expressed by Wigmore and the Rhode Island Court is the better view and that no sound reason exists for distinguishing between cases in which a memorandum used by a witness for the purpose of refreshing his recollection was used by him just before he went on the stand and those where he referred to the memorandum while he was on the stand. Whenever a witness admits that he had to refresh his recollection by reference to a memorandum, it is essential, in the interests of truth, that cross-examining counsel should have the right to determine whether that memorandum is what it is represented to be and whether it contains matter not referred to by the witness which might be helpful to the cross-examiner. Particularly should that be the case when, as here, the witnesses were government agents and the memoranda were actually in court. A vital right of defendants was, therefore, denied them for which the judgment must be reversed.

Conclusion.

It is respectfully submitted that the convictions should be reversed because of the violation of the constitutional rights of petitioners, the reception in evidence of telephone conversations intercepted in violation of the Communications Act, and the refusal of the Trial Court to permit counsel for defendants to inspect memoranda relied upon by government witnesses to refresh their recollections.

Respectfully submitted,

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